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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH GREEN,

Defendant and Appellant.

C059728

(Super. Ct. No. 07F04223)

A jury found defendant Kenneth Green guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))¹. Having waived a jury trial on the issue of his prior conviction, the trial court found true the allegation that defendant was previously convicted of burglary (§ 460), a serious felony under sections 667, subdivisions (b) through (i) and 1170.12. Defendant was sentenced to the middle term of three years, doubled to six years for the prior strike. Defendant appeals claiming

¹ Undesignated statutory references are to the Penal Code.

evidentiary and instructional error. Finding neither of his claims to have merit, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of December 31, 2006, Jessica Kunitz and Marcellus Owens were "hanging out" at the apartment of a friend "Barbara," when defendant came knocking on the front door. Kunitz and Owens ignored defendant's knocking, so he entered the apartment uninvited. The three got into an argument and defendant grabbed a baseball bat, using it to hit Kunitz repeatedly.

With Kunitz bleeding from her head, defendant left the apartment. Owens helped Kunitz to a friend's house, where they were able to call 911. At her friend's house, Kunitz passed out and was soon taken to the hospital by ambulance. At the hospital, Kunitz was treated for multiple bruises and cuts on her face, as well as a broken finger; the doctor also noted wounds to her forearm and elbow.

Defendant was subsequently arrested and charged with assault with a deadly weapon or by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). The amended information further alleged that in committing his crime, defendant personally inflicted great bodily injury on Kunitz, and was previously convicted of a serious felony within the meaning of sections 667, subdivisions (b) through (i) and

1170.12. Defendant pled not guilty, and the matter was set for trial.

Prior to trial beginning, knowing the victim would testify, defendant argued he should be permitted to impeach the victim with a prior allegation that she stabbed her husband with a steak knife. In response to the court's questions, defendant explained that the victim was not convicted of the charges, which were dismissed without explanation. On further examination, the court learned the husband had recanted his story and the victim claimed she had stabbed him in self-defense.

After hearing argument, the court ruled that defendant could not use the prior charges to impeach the victim, finding the information surrounding the incident was too vague and could cause the jury to judge her character and not her credibility. The trial proceeded and the jury found defendant guilty of assault with a deadly weapon, but did not find true the allegation that defendant personally inflicted great bodily injury on Kunitz.

Defendant waived his right to a jury trial on the allegation that he was previously convicted of a serious felony and the trial court subsequently found the allegation true. The court then sentenced defendant to the middle term of three years, doubled for the prior strike, consistent with the recommendation of the probation department. Defendant was

awarded 186 days of credit and ordered to pay various and fines and fees.

DISCUSSION

I

Defendant claims the trial court abused its discretion in precluding defendant from impeaching Kunitz, based on her prior "violent misconduct." We disagree.

In June 1982, the voters adopted article I, section 28 of the California Constitution (section 28) as an initiative measure.

Subdivision (f)(4) of section 28 provides that "[a]ny prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used without limitation for purposes of impeachment" In addition, subdivision (f)(2) of section 28 provides in relevant part that "relevant evidence shall not be excluded in any criminal proceeding Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782, or 1103."

Section 28, subdivision (f)(4) does not limit impeachment by conduct to prior felony convictions. (*People v. Wheeler* (1992) 4 Cal.4th 284, 292-294 (*Wheeler*) [discussing former section 28(f), now section 28(f)(4), holding a misdemeanor conviction admissible to impeach defendant where the conduct involved moral turpitude].) "[S]ection 28(d)[, now section

28(f)(2),] makes immoral conduct admissible for impeachment whether or not it produced any conviction, felony or misdemeanor. . . . Thus, impeaching misconduct now may, and sometimes must, be proven by direct evidence of the acts committed." (*Id.* at p. 297, fn. 7.)

The initial test for determining the admissibility of any past misconduct for impeachment purposes is the requirement of moral turpitude. Beyond that, "the latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad." (*Wheeler, supra*, 4 Cal.4th at p. 296.) The court in *Wheeler* cautioned that "impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*Wheeler, supra*, 4 Cal.4th at pp. 296-297, fn. omitted.)

A trial court's discretion under Evidence Code section 352 "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) Here, defendant sought to impeach the victim (Kunitz) with evidence that she had previously stabbed her husband with a steak knife. However, defendant's

information regarding the stabbing was scant. The record indicates Kunitz may have stabbed her husband in self-defense, her husband appeared to be recanting, and the charges against Kunitz had been dismissed without explanation.

The trial court concluded that with such little information regarding the incident, "there [was] a grave risk that the jury would confuse the issues, not construe or consider the evidence as character evidence and not as credibility evidence" Under these circumstances, we cannot say the trial court abused its broad discretion in precluding defendant from using the prior stabbing to impeach Kunitz.

II

Also without merit is defendant's claim that the definition of reasonable doubt found in Judicial Council of California Criminal Jury Instructions (2007-2008) (CALCRIM) No. 220, precluded jurors from considering a lack of evidence in determining whether reasonable doubt existed in this case. This court has rejected defendant's argument. (*People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1268-1269.) So have other courts. (See, e.g., *People v. Flores* (2007) 153 Cal.App.4th 1088, 1093; *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509.) This authority is sound and compels the rejection of defendant's argument.

DISPOSITION

The trial court judgment is affirmed.

SIMS, Acting P. J.

We concur:

NICHOLSON, J.

CANTIL-SAKAUYE, J.